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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**THIRD APPELLATE DISTRICT**

**(Placer)**

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| THE PEOPLE,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>STEVEN WYNN KUBBY,<br><br>Defendant and Respondent. | C038631<br><br>(Super. Ct. No. SCR-990033) |

A jury found defendant Steven Wynn Kubby guilty of two felonies: possession of psilocyn (Health & Saf. Code, §§ 11377, subd. (a), 11054, subd. (d)(19))[1] and of mescaline (§ 11350, subd. (a)). The trial court, however, reduced both convictions to misdemeanors.

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[1] Unless otherwise designated, all further statutory references are to the Health and Safety Code. We use the spelling of "psilocyn" found in the statute, although it is spelled as "psilocin" in the dictionary. (American Heritage Dict. (3d ed. 1992) p. 1461.)

This appeal addresses whether the trial court was entitled to reduce the conviction for possession of mescaline to a misdemeanor, despite the fact that the statute under which defendant was convicted only treats it as a felony (§ 11350, subd. (a)). The trial court reasoned that because the related offense of cultivation of peyote (§ 11363) -- which it deemed more serious -- can be treated either as a felony or a misdemeanor (that is, a wobbler), possession of mescaline (§ 11350, subd. (a)) should be treated the same. The People have appealed, and we shall reverse.[2]

Rules of statutory interpretation do not permit a court to rewrite section 11350 and ignore its plain language, which unambiguously makes mescaline possession a felony. Nor is the Legislature's decision to make mescaline possession a felony absurd so as to demand that we depart from the statute's plain language, despite the wobbler status given peyote cultivation under section 11363: Possession of mescaline -- a psychoactive drug that produces hallucinations -- can be rationally considered more serious than aspects of peyote cultivation, thereby justifying the discretion afforded by the Legislature to punish the latter.

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[2] Defendant cross-appealed. However, we granted the People's motion to dismiss his cross-appeal because the defendant fled the state's jurisdiction and therefore forfeited his right to appeal his convictions. (*People v. Kubby* (2002) 97 Cal.App.4th 619.)

We also disagree with defendant's contentions that "[t]he trial court's decision to treat possession of peyote as a wobbler was compelled by [the] doctrine of equal protection." Found guilty of possession of a hallucinogenic drug, defendant is not similarly situated to someone convicted of the different crime of peyote cultivation. (E.g., *People v. Barrera* (1993) 14 Cal.App.4th 1555, 1565.)

Finally, we reject defendant's claim that the trial court had authority to reduce the offense to a misdemeanor in order to avoid cruel and unusual punishment. Neither defendant's punishment of probation (which the People have not challenged) nor the denomination of defendant's offense as a felony could possibly constitute a punishment which shocks the conscience, offends fundamental notions of human dignity, or is grossly disproportionate to the offense.

**FACTUAL AND PROCEDURAL BACKGROUND**

We limit our statement of facts to only those pertinent to this appeal.

A search of defendant's residence pursuant to a warrant yielded, among other things, hundreds of marijuana plants.

However, a small quantity of peyote was also found (among other things): In a dresser drawer in a bedroom, a film canister contained what appeared to be four peyote buttons. A substance determined to be mescaline was extracted from one of the buttons by a criminalist at a laboratory.

Defendant was charged with multiple counts relating to the marijuana, as well as possession of mescaline (§ 11350, subd. (a)), psilocyn (also described as "psychedelic mushrooms"), hashish, drug paraphernalia, and a hypodermic needle. Defendant pleaded not guilty to all charges.

A jury found defendant guilty of possession of psilocyn and mescaline, but it deadlocked as to the other counts. The trial court then declared a mistrial as to those counts.

Defendant thereafter filed a motion to have both of his convictions reduced to misdemeanors. The governing statutes make possession of psilocyn a wobbler. (§§ 11054, subd. (d)(19), 11377, subd. (a).) But mescaline possession is a straight felony pursuant to section 11350, subdivision (a).[3]

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[3] At the time of defendant's offenses, section 11350, subdivision (a), provided in pertinent part: "Except as otherwise provided in this division, every person who possesses (1) any controlled substance . . . specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054 . . . shall be punished by imprisonment in the state prison." (Stats. 1991, ch. 257, § 1.)

In turn, mescaline and peyote were the controlled substances specified in paragraphs (14) and (15) of section 11054, subdivision (d). Specifically, at all relevant times, section 11054, subdivision (d)(14), specified "Mescaline," and section 11054, subdivision (d)(15), specified "Peyote -- Meaning all parts of the plant presently classified botanically as Lophophora williamsii Lemaire, whether growing or not, the seeds thereof, any extract from any part of such plant, and every compound, manufacture, salts, derivative, mixture, or preparation of such plant, its seeds or extracts . . . ." (Stats. 1995, ch. 455, § 3.)

Nonetheless, in the motion, defendant argued in part that it would be "'absurd'" to read section 11350 literally as a straight felony, when section 11363 made "the greater offense of cultivation of peyote" only a wobbler.[4] Defendant also maintained that treatment of possession of mescaline as a felony would violate his constitutional rights to equal protection and due process. The People opposed the motion.

At the hearing, the judge first reduced the psilocyn conviction to a misdemeanor based on the "very, very small amount" of the drug and defendant's "impeccably clean record."

The judge then said: "Going to the [section] 11350 violation, this is a little more sticky because of the charge itself, as it reads as a felony. But by reading it as such, it's absurd. It defies logic to say the lesser offense is more serious and is necessarily a felony, while a more serious offense can be made a misdemeanor. I have to give it a common sense interpretation, and that then also tells me that I have at least the power and the authority to declare this charge also to be a misdemeanor. [¶] So I have the authority to as far as I am concerned and the same facts pertaining to the analysis, and

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[4] Section 11363 provides: "Every person who plants, cultivates, harvests, dries, or processes any plant of the genus Lophophora, also known as peyote, or any part thereof shall be punished by imprisonment in the county jail for a period of not more than one year or the state prison."

this should be treated also as a misdemeanor, as anybody else would under the same circumstances."

The court then proceeded to sentence defendant to probation for three years with the condition that 120 days be served in the county jail.

The People appeal from the court's reduction of the mescaline possession conviction to a misdemeanor, "which constituted the dismissal of a felony offense and an unlawful sentence."[5]

## DISCUSSION

### I. Interpretation of Section 11350, Subdivision (a)

#### *A. Plain Meaning of the Statute*

The People contend that "the trial court was without jurisdiction to reduce the judgment [on mescaline possession] to a misdemeanor because a violation of section 11350, subdivision

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[5] Penal Code section 1238 sets forth the orders from which the People may appeal, including an order reducing a felony to a misdemeanor. (See, e.g., Pen. Code, § 1238, subd. (a)(6); *People v. Statum* (2002) 28 Cal.4th 682, 688-692.) Defendant does not challenge the People's right to appeal, but notes that the People's appeal may not challenge the order granting probation. In fact, Penal Code section 1238, subdivision (d), prohibits an appeal by the People from an order granting probation. Nor may the People seek, in substance, reversal of the probation order. (*People v. Douglas* (1999) 20 Cal.4th 85, 93.) Therefore, review here is limited to the order granting defendant's motion to reduce the mescaline conviction to a misdemeanor. (*Id.* at p. 88.) At oral argument, the People conceded the point.

(a), must be punished as a felony." In support, the People cite *People v. Prothero* (1997) 57 Cal.App.4th 126, 134, where this court held that "the trial court was without jurisdiction to declare [a violation of Penal Code section 290] a misdemeanor" where its statutory language clearly expressed the Legislature's intention that the offense be a felony.

We review de novo the proper interpretation of section 11350, subdivision (a). (See *People v. Superior Court (Blanquel)* (2000) 85 Cal.App.4th 768, 771 (*Blanquel*); *People v. Taylor* (1992) 6 Cal.App.4th 1084, 1090-1091.)

"'"We begin with the fundamental rule that our primary task in construing a statute is to determine the Legislature's intent. [Citation.]" [Citation.] "'The court turns first to the words themselves for the answer.' [Citations.]" [Citation.] When the statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it. [Citation.] The plain language of the statute establishes what was intended by the Legislature. [Citation.]' [Citation.]" (*People v. Statum, supra,* 28 Cal.4th at pp. 689-690.)

The plain language of section 11350, subdivision (a), does not permit any interpretation except that possession of the drugs referenced (including mescaline) be classified as a felony, not as a wobbler. The subdivision declares in relevant part that "every person who possesses . . . any controlled substance . . . specified in paragraph (14) . . . of subdivision

(d) of Section 11054 [mescaline] . . . shall be punished by imprisonment in the state prison." (§ 11350, subd. (a).) This language refers to a felony and only a felony. (Pen. Code, § 17, subd. (a); 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Introduction to Crimes, § 71, p. 116.) After all, "[i]f the statute does not characterize the crime as either a felony or a misdemeanor, but specifies a punishment, that becomes the test. If the statute calls for imprisonment in state prison, the offense is a felony." (1 Witkin & Epstein, *supra,* § 71, p. 116.)

Thus, the unequivocal language of section 11350, subdivision (a), makes possession of mescaline (and the other specified controlled substances) a felony and affords the court no discretion to impose a lesser punishment. (See *People v. Prothero, supra,* 57 Cal.App.4th at p. 130.) The classic wobbler language -- affording the sentencing judge discretion to impose punishment by imprisonment in the state prison or by a fine or imprisonment in the county jail -- does not appear expressly or by reference in section 11350, subdivision (a). (See Pen. Code, § 17, subd. (b); *People v. Prothero, supra,* 57 Cal.App.4th at p. 134.)

Accordingly, based on the clear and plain language of the statute, there is no need for any further construction. (*People v. Statum, supra,* 28 Cal.4th at pp. 689-690.) "Indeed, the most powerful safeguard for the courts' adherence to their constitutional role of construing, rather than writing, statutes

is to rely on the statute's plain language." (*Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 46.)

### ***B. Canons and Rules of Interpretation***

Although defendant does not dispute the clarity of the language of section 11350, subdivision (a), he invokes the canons of statutory construction to support the trial court's reduction of his felony conviction under section 11350, subdivision (a), to a misdemeanor, in light of section 11363.

However, this court has said: "We may also look to the canons of statutory construction to guide our quest for legislative intent. . . . [¶] But canons of statutory construction 'are "merely aids to ascertaining probable legislative intent." [Citation.] No single canon of statutory construction is an infallible guide to correct interpretation in all circumstances.' [Fn. omitted.] '[The canons] are tools to assist in interpretation, not the formula that always determines it. A court must be careful lest invocation of a canon cause it to lose sight of its objective to ascertain the Legislature's intent.' [Fn. omitted.]" (*Medical Board v. Superior Court* (2001) 88 Cal.App.4th 1001, 1013 (*Medical Board*).)

*1. <u>Harmonizing statutes on the same subject</u>.*

Defendant first argues that construing section 11350 in harmony with section 11363 -- a statute in pari materia (that is, relating to the same subject) -- reveals the anomaly that peyote possession is punished more severely than peyote

cultivation, which is a wobbler: "[S]ection 11363, which treats *cultivation* of peyote as a wobbler, creates an ambiguous anomaly in the overall statutory scheme which the court is empowered to resolve through statutory construction. . . . Since it would be absurd to find that the law prescribes leniency for active cultivators of peyote, but permits none for the mere possessor, the trial court correctly found that it had the authority to deem simple possession of peyote as a wobbler, the same as cultivation of peyote."

Defendant's argument is premised in part on the claim that he was convicted of possession of peyote, not mescaline, and that "[t]here is little, if any, difference between cultivating peyote and possessing growing peyote (except that the latter is more passive than the former)."

But defendant concedes that the jury's verdict form stated that he was guilty of mescaline (not peyote) possession. And the jury was polled at the request of defendant's trial counsel: Each juror affirmed that the verdict against defendant was for "possession of a controlled substance, to wit, mescaline." Finally, defendant was charged with mescaline possession.

Defendant nonetheless maintains that the trial judge made an implied factual finding that he possessed peyote, by reason of the fact that the judge reduced the charge to a misdemeanor in conformance with the discretion afforded for punishment for peyote cultivation under section 11363.

But we cannot ignore the multiple references in the record to the jury's express finding that defendant was guilty of possession of mescaline and the fact that defendant was charged with mescaline possession. Further, the court's reasoning for reducing the possession charge to a misdemeanor -- based on the discretion afforded for peyote cultivation, which it deemed the more serious offense -- in no way suggests that the court found the jury verdict to be contrary to the charge and the verdict form. Since the evidence showed that defendant's possession was of the part of the peyote plant that contained the mescaline, there is no basis in the record to give rise to an implied finding that defendant did not possess mescaline. Indeed, the laboratory criminalist who extracted mescaline from the peyote buttons found at defendant's residence testified at trial that there was a usable quantity of mescaline in the buttons that could be consumed by eating them.

Thus, we turn to whether the rule of in pari materia requires that section 11350 be construed to treat mescaline possession as a wobbler, despite its clear language to the contrary.

"Statutes relating to the same subject should be construed together and harmonized if possible." (1 Witkin & Epstein, Cal. Criminal Law, *supra,* Introduction to Crimes, § 32, p. 61; see also *Medical Board, supra,* 88 Cal.App.4th at p. 1016; *People v. Hitchings* (1997) 59 Cal.App.4th 915, 922.)

Indeed, "[w]e have long recognized the principle that even though a statute may appear to be unambiguous on its face, when it is considered in light of closely related statutes a legislative purpose may emerge that is inconsistent with, and controlling over, the language read without reference to the entire scheme of the law." (*Droeger v. Friedman, Sloan & Ross* (1991) 54 Cal.3d 26, 50; *People v. Honig* (1996) 48 Cal.App.4th 289, 327, fn. 16.)

But this rule of statutory construction does not permit a court to ignore one provision in a statute and to replace it with another. (*People v. Honig, supra,* 48 Cal.App.4th at p. 328.) To the contrary, "[i]n harmonizing the statutory scheme under the rule, the courts must avoid . . . nullifying one statute by another." (*Ibid.*) "'The rule of in pari materia is a corollary of the principle that the goal of statutory interpretation is to determine legislative intent.' [Fn. omitted.]" (*Medical Board, supra,* 88 Cal.App.4th at p. 1016.) The rule is meant "to harmonize statutes on the same subject [citations], giving effect to all parts of all statutes, if possible [citation]." (*Droeger v. Friedman, Sloan & Ross, supra,* 54 Cal.3d at p. 52.) It does not override the rule that "[a] court may not rewrite a statute to conform to a presumed intent that is not expressed." (*People v. Statum, supra,* 28 Cal.4th at p. 692.)

We can easily harmonize a statute that deems peyote *cultivation* a wobbler with a statute that deems mescaline (or

even peyote) *possession* a felony. Because both deal with different circumstances, we can give effect to both. Ironically, although the rule of in pari materia asks the court "to harmonize statutes on the same subject [citations], giving effect to all parts of all statutes, if possible [citation]" (*Droeger v. Friedman, Sloan & Ross, supra,* 54 Cal.3d at p. 52), defendant asks that we *not* give full effect to the statute punishing mescaline possession as a felony. Instead, the only remedy that defendant seeks -- replacing the felony treatment for mescaline possession with wobbler status -- is precisely a construction prohibited by the rule of in pari materia. Rather than harmonizing statutes on the same subject, we would be nullifying part of one. We therefore cannot construe sections 11350 and 11363 together pursuant to the rule of in pari materia so as to replace the felony classification unequivocally expressed in section 11350.

Defendant suggests that section 11350 "defers to other statutes in the same division" -- namely, to section 11363 (cultivation) -- because "[section 11350] is prefaced with" the introduction, "[e]xcept as otherwise provided in this division." He contends that this "means that the Legislature intended more specific statutes to control over the general sweep of section 11350." That may be. But there is no provision in the division that separately addresses the punishment for possession of mescaline. To the contrary, another statute in the same division -- section 11377, subdivision (a) -- makes possession

of various controlled substances a wobbler but expressly *excludes* possession of mescaline and peyote from its provisions, further demonstrating that possession of mescaline is meant to be a felony.

Accordingly, the rule of in pari materia does not help defendant.

*2. Avoiding absurdity.*

Defendant next argues that the "[l]anguage of a statute should not be given a literal meaning if doing so would result in absurd consequences" and that "[t]he sentencing court found that it would be absurd and illogical to treat cultivation of peyote as a wobbler while treating mere possession as a straight felony."

Interpretation of statutory language that leads to absurd results is to be avoided. (*People v. Loeun* (1997) 17 Cal.4th 1, 9.) If a literal reading of the statutory language "would lead to an absurd result or thwart the manifest will of the Legislature, we are required to interpret the law in a manner which avoids the absurdity and is consistent with the legislative design." (*Blanquel, supra,* 85 Cal.App.4th at p. 771.) However, the rare cases in which statutes have been construed against their plain language to avoid an absurd result have done so in a context in which the Legislature's intent to avoid that result is apparent. (*Maxon Industries, Inc. v. State Compensation Ins. Fund* (1993) 16 Cal.App.4th 1387, 1391.)

In this case, we find no absurdity in treating a conviction for mescaline possession under section 11350, subdivision (a), as a felony, while affording wobbler treatment to peyote cultivation pursuant to section 11363. As noted, defendant was charged and convicted of possessing mescaline, not peyote. Mescaline is a psychoactive drug that produces hallucinations, which is obtained from the mescal or peyote button. (American Heritage Dict., *supra*, p. 1131.) When taken internally by chewing the buttons, it produces several types of hallucinations. (See *People v. Woody* (1964) 61 Cal.2d 716, 720; *People v. Medina* (1972) 27 Cal.App.3d 473, 480.) In contrast, peyote is statutorily defined as "all parts of" the peyote plant, "whether growing or not, the seeds thereof, any extract from any part of such plant, and every compound, manufacture, salts, derivative, mixture, or preparation of such plant, its seeds or extracts." (§ 11054, subd. (d)(15).) Thus, one can possess peyote without possessing mescaline, and the cultivation of peyote can involve various stages of growth before the pysychoactive drug is produced.

Accordingly, there is nothing absurd in construing the clear language of section 11350, subdivision (a), to mean what it says -- that possession of mescaline is a felony -- in contrast to the discretion afforded to treat peyote cultivation as a felony or misdemeanor, depending upon the state of growth and circumstances of the cultivation. First, a conviction for possession of mescaline can rationally be viewed as more serious

than aspects of peyote cultivation, which may not yet have produced the mescaline -- a hallucinogenic drug suitable for use or sale. (See *People v. Woody, supra,* 61 Cal.2d at p. 720; *People v. Medina, supra,* 27 Cal.App.3d at p. 480; American Heritage Dict., *supra*, pp. 1131, 1356.) After all, drug abuse and drug abusers are the primary evils against which the drug prohibitions seek to protect society. (See Rosenthal, In Opposition to Drug Legalization (1991) 24 U.C. Davis L.Rev. 637, 643-644.) In contrast, the cultivation process may be interrupted or involve participation at a point far short of the production of any usable substance. The further the distance from the end-product, the less culpable may be the activity.

Second, the range of conduct that is culpable under the cultivation statute is more varied than possession, may not involve any possession, and may thus warrant different treatment.[6] For instance, a defendant hired as a laborer to prepare soil for planting, knowing that the crop to be planted is peyote, may be criminally liable as a "person who . . . cultivates" peyote under section 11363, without ever coming into

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[6] Possession may be actual or constructive. (*People v. Showers* (1968) 68 Cal.2d 639, 643-644.) Actual possession generally means physical possession. (2 Witkin & Epstein, Cal. Criminal Law, *supra,* Crimes Against Public Peace and Welfare, § 85, p. 598.) A defendant may be deemed in constructive possession of a controlled substance when it is in a place accessible to the defendant, and the defendant has control over it. (*People v. Showers, supra,* 68 Cal.2d at p. 644.)

contact with the plant.[7] (See CALJIC No. 12.24 (7th ed. 2003), p. 39 [setting forth the elements of a violation of section 11358, marijuana cultivation, defined in the same language as section 11363].)

Equally, a defendant property owner may violate the cultivation statute as an aider and abettor without engaging in conduct amounting to possession of peyote, let alone mescaline. For instance, in *People v. Null* (1984) 157 Cal.App.3d 849, 853, the appellate court held that a property owner "may be responsible as an aider and abettor for cultivation of contraband on his land if he had knowledge of its presence for a sufficient length of time to take corrective action." (See also Com. to CALJIC No. 12.24, *supra*, p. 39; 1 Witkin & Epstein, Cal. Criminal Law, *supra,* Introduction to Crimes, § 81, p. 130.)[8]

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[7] "Cultivate" is defined, inter alia, as "1.a. To improve and prepare (land), as by plowing or fertilizing, for raising crops; till. b. To loosen or dig soil around (growing plants). 2. To grow or tend (a plant or crop). . . ." (American Heritage Dict., *supra,* p. 454.)

[8] The marijuana cultivation statute at issue in *People v. Null*, *supra*, 157 Cal.App.3d 849 -- section 11358 -- employs language identical to section 11363, so as to impose liability on "[e]very person who plants, cultivates, harvests, dries, or processes" marijuana. However, section 11358 treats marijuana cultivation as a straight felony, not a wobbler like section 11363. But this difference may be explained by the higher prevalence of marijuana cultivation and therefore the increased need for deterrence.

In short, it is not absurd to afford discretion whether to charge peyote cultivation as a felony or misdemeanor, but to treat the more narrowly defined offense of mescaline possession as a felony. It is not our role as courts to rewrite a clear legislative enactment that is not absurd.

Citing *People v. Cina* (1974) 41 Cal.App.3d 136, 140, and *People v. Kun* (1987) 195 Cal.App.3d 370, 375, defendant nevertheless contends that "[i]t is obvious and axiomatic that active production and proliferation of contraband is a more serious offense than mere possession of contraband." But in each of those cases, the courts merely stated that the Legislature "could have rationally concluded" (*Cina, supra,* at p. 140) or "ha[d] determined" that the cultivation of *marijuana* is a serious offense (*Kun, supra,* at p. 375), which could carry a higher degree of culpability than simple possession of *marijuana* (*Cina, supra,* at p. 140).

We say no more here -- that it was rational for the Legislature to afford more discretion in the punishment of peyote cultivation than mescaline possession. It is therefore not absurd to interpret the mescaline possession statute pursuant to its plain language and to similarly construe the peyote cultivation statute pursuant to its plain language to preserve the court's discretion to classify that offense as a

felony or misdemeanor so as to suit the degree of culpability arising from the circumstances of the particular cultivation.[9]

*3. Rule of lenity.*

Defendant next argues that "[t]he trial court's construction of the statutory scheme governing peyote was compelled by the rule of lenity."

Under that rule, "[w]hen language which is susceptible of two constructions is used in a penal law, the policy of this state is to construe the statute as favorably to the defendant as its language and the circumstance of its application reasonably permit. The defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or

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[9] We need not address the rationale of treating peyote possession more severely than peyote cultivation since we deal here with possession of mescaline -- the hallucinogenic part of the peyote plant. But we recognize that under section 11350, subdivision (a), possession of peyote (as defined in section 11054, subdivision (d)(15)) -- which encompasses all parts of the plant, including the seeds -- is also a felony. Nonetheless, possession of a controlled substance requires that the substance be in a quantity that can be used. (*People v. Rubacalba* (1993) 6 Cal.4th 62, 66 (*Rubacalba*); CALJIC No. 12.00, *supra*, p. 5.) Since defendant was convicted of mescaline possession, we need not decide whether possession of peyote seeds, or some part of the peyote plant other than the button, constitutes possession of a usable quantity of that controlled substance, in violation of section 11350, subdivision (a). (See *Rubacalba*, at p. 66; cf. *People v. Fein* (1971) 4 Cal.3d 747, 754 [two burnt marijuana seeds could not sustain conviction for use, possession, or sale of narcotics], disapproved on another ground in *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242.)

the construction of a statute." (*People v. Overstreet* (1986) 42 Cal.3d 891, 896.)

"Strict construction of penal statutes protects the individual against arbitrary discretion by officials and judges and guards against judicial usurpation of the legislative function which would result from enforcement of penalties when the legislative branch did not clearly prescribe them. Strict construction also prevents judicial interpretation from changing the legal consequences of acts completed prior to the decision and thus aids in meeting the requirement that a defendant have fair warning of the consequences of his acts reflected in the constitutional prohibition against ex post facto laws." (*Ibid.*)

The rule of lenity has no application here. First, section 11350, subdivision (a), is not "susceptible of two constructions" with respect to its treatment of mescaline possession as a felony. The rule of lenity only comes into play where the statutory language is reasonably susceptible of two equally plausible constructions, not where the challenged language is clear. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 622; *People v. Prothero, supra,* 57 Cal.App.4th at p. 131.)

Second, in light of the clarity of the statutory language, section 11350's treatment of possession of mescaline as a felony does not implicate either purpose underlying the rule of lenity -- the risk of arbitrary discretion by judges in imposing penalties and the lack of fair warning of the consequences of an individual's possession of mescaline. To the contrary, treating

section 11350 as a wobbler, when its terms do not so provide, promotes such arbitrariness.

Citing *People v. Garcia* (1999) 21 Cal.4th 1, 11 (*Garcia*), defendant attempts to extend the rule of lenity by asserting that "[a] variation of the rule of lenity permits the court to rewrite a penal statute in favor of the defendant when necessary 'to avoid an internal conflict or absurdity.'"[10]

But as shown, there is no internal conflict or absurdity here. Indeed, the court in *Garcia* conceded that the "lenity policy is of little help" where the language is not susceptible of the interpretation proposed by the defendant. (*Garcia*, *supra*, 21 Cal.4th at pp. 10-11.)

*4. Construction consistent with the Constitution.*

Defendant's last canonical contention is that the "trial court's construction of . . . the statutory scheme was further compelled by the rule requiring courts to construe statutes consistent with the Equal Protection Clause." In invoking this rule, defendant relies on the following principle: "'If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole

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[10] Our state high court in *Garcia, supra,* 21 Cal.4th at page 11, actually said: "*If*, perhaps, the court were forced to choose between two possible ways of rewriting a penal statute to avoid an internal conflict or absurdity, we might apply a variation on the rule of lenity and choose the rewriting more favorable to the defendant." (Italics added.)

or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable. [Citations.]'" (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 509; *People v. Birks* (1998) 19 Cal.4th 108, 135.)

But defendant is unable to overcome the same obstacle that prevents application of the rule of lenity: Section 11350, subdivision (a), is not reasonably susceptible of an interpretation that mescaline possession may be punished as a misdemeanor. Therefore, such a construction may not be adopted under the rule encouraging a constitutional interpretation where a statute is susceptible of two constructions, one of which is constitutional and the other of which is not. (*In re King* (1970) 3 Cal.3d 226, 237 [finding statute "too clear" to construe it to avoid constitutional question]; see also *Chapman v. United States* (1991) 500 U.S. 453, 464 [114 L.Ed.2d 524, 537-538] ["The canon of construction that a court should strive to interpret a statute in a way that will avoid an unconstitutional construction is useful in close cases, but it is '"not a license for the judiciary to rewrite language enacted by the legislature"'"]; 58 Cal.Jur.3d (1980) Statutes, § 97, pp. 461-462 ["in pursuing such a predilection for constitutionality, the courts may not engage in wholesale rewriting of a statute's

provisions, nor may they pervert or destroy the plain language of the statute in an attempt to make it constitutionally express that which the legislature did not declare" (Fns. omitted.)].)

## II. Constitutional Challenges to Section 11350, Subdivision (a)

### *A. Equal Protection*

Defendant next turns to the claimed unconstitutionality of section 11350, subdivision (a). He argues that "a statutory scheme which extends leniency to those who plant, cultivate, harvest, dry, or process peyote [citation], but denies the same to those who merely possess it, irrationally denies the mere possessor the right to equal protection and uniform application of the law."

The United States Constitution and the state Constitution prohibit the state from denying any person equal protection of the laws. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7, subd. (a).) We find no denial of equal protection here because defendant is not similarly situated with peyote cultivators.

The California Supreme Court recently summarized the principles of equal protection analysis: "Broadly stated, equal protection of the laws means 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances in their lives, liberty and property and in their pursuit of happiness.' [Citation.] In determining whether such a deprivation has occurred, the court's ultimate task is to examine the validity of the underlying purpose, and the extent to which the disputed

statutory classification promotes such purpose. [Citations.] [¶] As a foundational matter, however, all meritorious equal protection claims require a showing that 'the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' [Citation.]" (*People v. Wutzke* (2002) 28 Cal.4th 923, 943-944 (*Wutzke*); see *Tigner v. Texas* (1940) 310 U.S. 141, 147 [84 L.Ed. 1124, 1128].)

Thus, "[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." (*In re Eric J.* (1979) 25 Cal.3d 522, 530.)

But California courts have long accepted the proposition that "[p]ersons convicted of *different* crimes are not similarly situated for equal protection purposes." (*People v. Macias* (1982) 137 Cal.App.3d 465, 473; *People v. Barrera, supra,* 14 Cal.App.4th at p. 1565; *People v. Cortez* (1985) 166 Cal.App.3d 994, 999-1001; *Smith v. Municipal Court* (1978) 78 Cal.App.3d 592, 601; 3 Witkin & Epstein, Cal. Criminal Law, *supra,* Punishment, § 115, pp. 176-177.)

For instance, a penalty of six months to life for assault with a deadly weapon is not violative of equal protection simply because someone convicted of assault with intent to commit murder may receive a lesser penalty. (*People v. Romo* (1975) 14 Cal.3d 189, 196-197.) Likewise, "persons convicted of possessing heroin for personal use and persons convicted of

transporting heroin are not similarly situated." (*People v. Cortez, supra,* 166 Cal.App.3d at p. 1000.)

Here, defendant was convicted of mescaline possession, not peyote cultivation. Because he was convicted of an entirely different crime from that with which he makes his comparison, he has not shown that the state has adopted classifications that affect two similarly situated persons in an unequal manner.

Citing *Fullerton Joint Union High School Dist. v. State Bd. of Education* (1982) 32 Cal.3d 779, 798, footnote 19 (*Fullerton*), defendant argues, however, that the "first step in any equal protection analysis, before deciding the issue of whether groups are 'similarly situated,' is to determine the applicable standard of review. [Citation.] This is so because the standard of review will also apply to the issue of whether groups are similarly situated."

In *Fullerton,* the plurality opinion of our state high court stated: "Some decisions speak of an initial constitutional inquiry to determine whether the groups affected are similarly situated with respect to the purpose of the legislation or other state action. [Citation.] To ask whether two groups are similarly situated in this context, however, is the same as asking whether the distinction between them can be justified under the appropriate test of equal protection. Obvious dissimilarities between groups will not justify a classification which fails strict scrutiny (if that test is applicable) or

lacks a rational relationship to the legislative purpose. [Citations.]" (*Fullerton, supra,* 32 Cal.3d at p. 798, fn. 19.)

Theoretically speaking, there may be some sense in this. But as noted, *Fullerton* was "a plurality opinion" and "thus lacks authority as precedent," as our state high court pointed out in declining to apply it in *Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 918. (See also 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 974, pp. 1023-1025.)

Instead, most recently, and contrary to *Fullerton,* in *Wutzke,* our Supreme Court stated that "[a]s a foundational matter . . . all meritorious equal protection claims require a showing that 'the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' [Citation.]" (*Wutzke, supra,* 28 Cal.4th at p. 943.) There, the state high court rejected an equal protection challenge to the harsher and mandatory 15-year-to-life sentence for those molesters who are not relatives or members of the victim's household. The defendant had argued that providing better treatment for relatives and household members who molest, while denying such treatment to other emotional relationships, denied him equal protection. As a threshold matter, however, the Supreme Court found that the defendant was "not similarly situated for sentencing purposes to the relatives and nonrelative household members" because family and household offenders are potentially less dangerous to society as a whole.

(*Id.* at p. 944.) There was no discussion of a particular standard of review. (*Id.* at pp. 943-944.) Rather, the court focused on whether the defendant was similarly situated with respect to the purpose of the statute. (*Id.* at p. 944.)

We accordingly agree with the vast majority of California courts which hold that "[p]ersons convicted of *different* crimes are not similarly situated for equal protection purposes." (*People v. Macias, supra,* 137 Cal.App.3d at p. 473.)

Significantly, where criminal classifications have been found to violate equal protection, the similarly situated persons have engaged in identical or virtually identical crimes. Thus, in *People v. Olivas* (1976) 17 Cal.3d 236, 239, cited by defendant, the state Supreme Court concluded on equal protection grounds that a misdemeanant between the ages of 16 and 21 could not be constitutionally committed to the Youth Authority for a term potentially longer than the maximum jail term that might be imposed for *the same offense* if committed by a person over the age of 21.

In contrast, here, defendant is charged with a different crime of a different circumstance and danger than the one with which he seeks to compare it.

Citing *People v. Nguyen* (1997) 54 Cal.App.4th 705, defendant argues that the principle that defendants convicted of different crimes are not similarly situated "does not mean that the two offenses in question must be mathematically identical.

Instead, under the Equal Protection Clause, defendants who have committed the 'same quality' of offense *are* similarly situated."

However, while *People v. Nguyen, supra,* 54 Cal.App.4th 705, noted that "an equal protection claim cannot be resolved by simply observing that the members of group A have distinguishing characteristic X while the members of group B lack this characteristic," it also ruled that "[t]he 'similarly situated' prerequisite . . . means that an equal protection claim cannot succeed, and *does not require further analysis*, unless there is some showing that the two groups are sufficiently similar with respect to the purpose of the law in question that some level of scrutiny is required in order to determine whether the distinction is justified." (*Id.* at p. 714, italics added; accord, *People v. Jones* (2002) 101 Cal.App.4th 220, 227.) In *Nguyen*, it found the threshold showing was met where both groups were petty thieves who had two prior serious felony convictions for purposes of the Three Strikes law, but where one group's petty theft was a felony. (*Nguyen, supra,* 54 Cal.App.4th at pp. 714-715.) And it noted that "in some appellate cases *Olivas*[, *supra*, 17 Cal.3d 236] can be distinguished because the two groups of offenders have committed different offenses and therefore are not similarly situated." (*Nguyen,* at p. 717, fn. 6.)

That is exactly the case here. Defendant seeks to compare his possession conviction with those convicted of cultivation.

The two are not similarly situated for the reasons we have discussed; therefore, there is no equal protection violation. [11]

### *B. Cruel and Unusual Punishment*

Defendant's final argument is that "the court . . . had the constitutional authority to reduce the offense to a misdemeanor on a case-by-case basis, where necessary to avoid punishment disproportionate to defendant's individual culpability." Defendant maintains that his culpability was "*de minimus*" since the judge indicated at sentencing "the very, very small amount of contraband" involved, the defendant's "impeccably clean record," and the presence of "absolutely no aggravating circumstances."[12]

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[11] At oral argument, defendant cited *In re Williams* (1977) 69 Cal.App.3d 840, in support of his claim that defendants convicted of possession and cultivation are similarly situated. There, this court struck down a five-year mandatory restriction on parole eligibility for *possession* of heroin with a prior in light of the fact that a *seller* of heroin with a prior narcotic conviction could be paroled after serving less than four years. But that decision was analyzed under the prohibition against cruel and unusual punishment and thus a different test applied. Furthermore, the Legislature had designated the sale of heroin to be more serious than its possession, making the *longer* restriction on parole eligibility for the *less* serious possession offense anomalous in light of the legislative classification. Here, the legislative classification is not *inherently* inconsistent as in *Williams*.

[12] Defendant acknowledges that the judge did not discuss cruel and unusual punishment as a basis for his decision, but contends that "the court's comments implied a finding that a felony disposition for this offense would be disproportionate punishment in light of defendant's individual culpability." We need not endorse this reading of the court's remarks. And

***(CONTINUED.)***

Most recently, however, in *Ewing v. California* (2003) 538 U.S. ___ [155 L.Ed.2d 108], a majority of the United States Supreme Court agreed that the Eighth Amendment had no proportionality test, or at best, a requirement that sentences not be grossly disproportionate to the crime. There, the Supreme Court held that a prison term of 25 years to life for a repeat offender who shoplifted nearly $1,200 worth of merchandise was not cruel and unusual punishment.

And in *Harmelin v. Michigan* (1991) 501 U.S. 957 [115 L.Ed.2d 836], a majority of the Supreme Court rejected an Eighth Amendment challenge to a sentence of life in prison without the possibility of parole for a first-time offender convicted of possessing 672 grams of cocaine.

Clearly, in this case, treatment of defendant's conviction for mescaline possession as a felony (and his term of probation) cannot be deemed cruel and unusual punishment if life imprisonment for possession of a large quantity of drugs is not. As the plurality opinion in *Ewing* stated, "We do not sit as a 'superlegislature' to second-guess these policy choices." (*Ewing v. California, supra,* 538 U.S. at p. ___ [155 L.Ed.2d at

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because we address the merits of defendant's contention of cruel and unusual punishment, there is no need to decide whether the record reflects that defendant waived this issue by failing to object on that ground in the trial court. (*People v. Cortez* (1999) 73 Cal.App.4th 276, 286, fn. 10.)

p. 121] (plur. opn. of O'Connor, J., joined by Rehnquist, C. J. and Kennedy, J.).)

Turning to California's parallel constitutional prohibition, "[t]o determine whether a sentence is cruel or unusual under the California Constitution as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including his or her age, prior criminality, and mental capabilities. [Citation.] If the penalty imposed is 'grossly disproportionate to the defendant's individual culpability' [citation], so that the punishment '"'shocks the conscience and offends fundamental notions of human dignity'"' [citation], the court must invalidate the sentence as unconstitutional." (*People v. Lucero* (2000) 23 Cal.4th 692, 739-740; *People v. Dillon* (1983) 34 Cal.3d 441, 478.)

But "'[o]nly in the rarest of cases could a court declare that the length of a sentence mandated by the Legislature is unconstitutionally excessive.' [Citations.]" (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1214, quoting *People v. Martinez* (1999) 76 Cal.App.4th 489, 494.) Presented with a rational basis for the penalty chosen, courts should hesitate to call a penalty cruel and unusual. (*In re Maston* (1973) 33 Cal.App.3d 559, 562.)

In this case, defendant's term of probation (from which the People may not appeal (see fn. 5, *ante; People v. Douglas, supra,* 20 Cal.4th at p. 88) and his treatment as a felon for possession of a prohibited drug can hardly be deemed to shock the conscience or offend fundamental notions of human dignity. (*People v. Lucero, supra,* 23 Cal.4th at pp. 739-740.)

The penalty is simply not grossly disproportionate to defendant's individual culpability. After all, the jury found that defendant was in possession of a hallucinogenic drug in its usable form, that is, a peyote button containing mescaline. Defendant's testimony at trial even suggested that he himself regarded possession of mescaline more serious than marijuana or psilocyn possession, in that he readily admitted possession of these latter drugs but disclaimed knowledge of the peyote buttons. Defendant testified at trial that he suffered from a rare form of cancer and that he turned to marijuana to treat it, using it since the 1980's. And he testified that he obtained psilocybin mushrooms in pursuit of a theory that the Bible described them in the Book of Exodus and wrote an essay and book on the subject. But defendant disclaimed all knowledge of the peyote buttons found in a bedroom at his residence. In convicting defendant of mescaline possession, the jury evidently did not credit his disavowal.

Defendant also contends that a felony sentence for mescaline possession constitutes cruel and unusual punishment because he is a first-time offender. That argument is

tantamount to the contention that no first-time offender can be convicted for felony possession of a hallucinatory drug under section 11350, subdivision (a), regardless of the actual sentence imposed. The Constitution is not so rigid.

Defendant also asserts that the wobbler treatment of peyote cultivation indicates that it is one of the least dangerous drugs falling under the proscription of section 11350, subdivision (a). Defendant cites *People v. Woody, supra,* 61 Cal.2d 716, acknowledging expert opinion that peyote works "'no permanent deleterious injury'" to Native Americans who use it for religious purposes. (*Id.* at p. 723.) But the court also described the following characteristics of peyote use (whose "principal constituent is mescaline" (*id.* at p. 720)): "In most subjects it causes extraordinary vision marked by bright and kaleidoscopic colors, geometric patterns, or scenes involving humans or animals. In others it engenders hallucinatory symptoms similar to those produced in cases of schizophrenia, dementia praecox, or paranoia." (*Ibid.*) A drug that induces mental states that mimic psychosis is not one to be "regarded as one of the *least* dangerous of the drugs proscribed by section 11350," as defendant asserts.

In sum, neither defendant's term of probation nor his status as a felon is so disproportionate to the offense of possession of a powerful hallucinogen that it shocks the conscience and offends fundamental notions of human dignity. (Cf. *Smith v. Municipal Court*, *supra*, 78 Cal.App.3d at p. 598

[one-year maximum misdemeanor sentence for use or being under the influence of a controlled substance (§ 11550) is "obviously constitutional"].)

**DISPOSITION**

The judgment is reversed insofar as the trial court reduced defendant's conviction for mescaline possession under section 11350, subdivision (a), to a misdemeanor. The judgment is modified to reflect that the conviction is a felony. Except as modified, the judgment is affirmed.

KOLKEY, J.

We concur:

BLEASE, Acting P.J.

RAYE, J.